



FEB 20 1974

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-641

EDWIN A. SNOW and HELEN B. SNOW,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

BURGESS L. DOAN
HAROLD W. WALKER522 Dixie Terminal Building
Cincinnati, Ohio 45202

Counsel for Petitioners

February 21, 1974

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OPINIONS BELOW

A. The opinion of the Court of Appeals, reported at 482 F.2d 1029, (C.A. 6, 1973), appears in the appendix to the Petition for a Writ of Certiorari at pp. 35-44 (Cert. App. 35-44).

B. The opinion of the United States Tax Court, reported at 58 T.C. 585 (1972), also appears in the appendix to the Petition for a Writ of Certiorari at pp. 13-34 (Cert. App. 13-34).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 17, 1973. The Petition for a Writ of Certiorari was filed on October 12, 1973, and was granted on January 7, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1) .

QUESTION PRESENTED

Whether a business is entitled to deduct research and experimental expenses incurred in the development of its initial product.

STATUTE INVOLVED

The Internal Revenue Code of 1954 (26 U.S.C.), Section 174: RESEARCH AND DEVELOPMENT EXPENDITURES.

“(a) Treatment as Expenses —

“(1) In General. — A taxpayer may treat research or experimental expenditures which are paid or incurred by him during the taxable year in connection with his trade or business as expenses which are not chargeable to capital account. The expenditures so treated shall be allowed as a deduction.

“(2) When Method May Be Adopted —

“(A) Without Consent. — A taxpayer may, without the consent of the Secretary or his delegate, adopt the method provided in this subsection for his first taxable year —

“(i) which begins after December 31, 1953, and ends after the date on which this title is enacted, and

"(ii) for which expenditures described in paragraph (1) are paid or incurred.

"(B) With Consent. — A taxpayer may, with the consent of the Secretary or his delegate, adopt at any time the method provided in this subsection.

"(3) Scope. — The Method adopted under this subsection shall apply to all expenditures described in paragraph (1). The method adopted shall be adhered to in computing taxable income for the taxable year and for all subsequent taxable years unless, with the approval of the Secretary or his delegate, a change to a different method is authorized with respect to part or all of such expenditures."

STATEMENT

This case involves deficiencies asserted in Federal income taxes for the taxable year 1966 in the amount of \$6,247.00. The deficiency involved is attributable to an adjustment disallowing as a deduction Petitioner Snow's¹ distributive share of the net operating loss of a partnership, d/b/a Burns Investment Company ("Burns").

Burns reported a net operating loss in the amount of \$36,780.44 on its 1966 Federal income tax return (Form 1065) (App. 124) of which Snow's distributive share was \$9,195.00 (App. 127). The loss arose as a result of the partnership incurring and paying expenses in connection with research and development of a new product.

The Commissioner of Internal Revenue determined the research and development expenses were not allowable to Burns under Section 174 or any other section of the Internal Revenue Code.

¹ Helen B. Snow is also listed as a petitioner herein solely because she and her husband filed a joint return in 1966.

The United States Tax Court upheld the Commissioner, stating:

"The expenditures for research and experimentation were not paid in connection with the trade or business of the partnership, or of Snow, and are not deductible under Section 174." (Cert. App. 13).

The United States Court of Appeals for the Sixth Circuit sustained the Tax Court's decision:

". . . we hold that the expenditures sought to be deducted by Burns Investment Company in 1966 were 'pre-operating' expenses and are not deductible under Section 174." (Cert. App. 40).

The facts involved in this case are not complex and may be briefly stated.

In 1966, a limited partnership was formed in Cincinnati, Ohio, under the name of "Burns Investment Co." The partnership consisted of one general partner, David H. Trott ("Trott"), and three limited partners, of whom Petitioner Snow was one. Snow, who at that time was an executive with the Procter & Gamble Co. in Cincinnati, contributed \$10,000 for a four percent interest in Burns. (App. 82).

Snow had previously joined with Trott in the formation of two other limited partnerships, Echo Development Company in 1965 (App. 90) and Courier Enterprises, also in 1965 (App. 93). Both Echo and Courier had been formed to develop and market new products, a telephone answering device ("Écho") and an electronic tape recorder ("Courier").

The Burns Investment Company Partnership Agreement states that "The purpose and business of the partnership shall be the development of a special purpose incinerator for the consumer and industrial markets." (App.

81). Trott, the inventor and general partner in Burns, had conceived the idea for this incinerator sometime in 1964. (App. 50). Trott made and tested a number of prototypes between 1964 and 1966. (App. 52). In December of 1965, he received a letter from patent counsel which stated that there were several features of this burner that were patentable. (App. 98-9). In early 1966, however, he was further advised by patent counsel that the incinerator as a whole had not yet been sufficiently "reduced to practice" and that additional work would be necessary to develop the prototype into a marketable product. (App. 102-3).

In order to secure the funds necessary for this further modification and development, Trott, in July of 1966, formed Burns Investment Company. Snow and the two other limited partners contributed the capital; Trott contributed all right, title and interest in the incinerator. During the period between July 1, 1966, and December 31, 1966, Burns paid a total of \$36,780.44 for development work on the burner. This work involved the building and testing of a number of various models of the burner. (From 1964 on, over twenty-five different models of this incinerator have been produced and tested.) The shopwork was done for Burns by Crossbow, Inc., a corporation engaged in manufacturing, machining and fabricating. The Regulations promulgated under Section 174 specifically allow a taxpayer to deduct such payments.²

There is no dispute as to the amount claimed or as to

² Regulation 1.174-2: "(2) The provisions of this section apply not only to costs paid or incurred by the taxpayer for research or experimentation undertaken directly by him but also to expenditures paid or incurred for research and experimentation caused in his behalf by another person or organization such as, . . . an engineering company or similar contractor. . . ."

the fact that these expenses were incurred for research and development purposes. (Cert. App. 28).

In addition to his contribution of capital, during 1966 Petitioner Snow also contributed time to meetings and conversations with Trott concerning the progress not only of the incinerator but also that of the telephone answering device and tape recorder being developed by Echo and Courier. Extensive experience in advertising, marketing and management (App. 13) enabled him to offer a great deal of advice in these areas, advice that was relied upon by Trott and the other partners. (App. 78). Snow became interested in Burns upon learning that the burner would probably be granted patent protection. (App. 19). Snow eventually became a partner in Burns because he was convinced that there was a considerable market for such a product and that Burns would therefore be a profitable enterprise. (App. 19).

During the year 1966, Burns Investment Co. reported no sales of the incinerator or any other product. The burner was still in the process of being perfected and, in the opinion of the partners, had not yet reached the stage where it could be successfully marketed. Throughout this period Trott, the inventor and general partner, was devoting approximately one-third of his time to the incinerator project. (App. 50). Trott also expected the burner to become profitable in the "near future." (App. 75).

Burns filed a partnership return of income, Form 1065 (App. 124), for the taxable year 1966, showing a loss of \$36,780.44, of which Snow's share was \$9,195.11. The entire amount of this loss was attributable to the research and development expenditures. Both Echo and Courier filed partnership returns for the taxable years 1965 and 1966 (App. 138, 143, 152, 157), and they also claimed research and development expenses. However, the ex-

penses claimed by these partnerships were not disturbed by the Commissioner. Presumably this discrepancy in treatment was motivated by the fact that both Echo and Courier had products which were in a more advanced stage of development and which were then held available for sale or licensing.

In the succeeding years, the development of the Burns incinerator continued. Application for a patent was filed on June 10, 1968. A patent was issued on March 3, 1970, to Trott, the general partner. (App. 165). A number of foreign patents were also applied for and granted. Prior to 1970 Burns was incorporated under the name of Burns Investment Corporation to produce and market the incinerator under the trade name "Trash-Away." Snow has continued to participate in the venture and today serves as the corporation's Chairman of the Board. The "Trash-Away" is currently being produced, marketed and sold by Burns Investment Company. (App. 169).

SUMMARY OF ARGUMENT

The legislative history of Section 174 provides clear evidence that this section was enacted in order to encourage research and development on the part of "small or beginning" businesses. The Tax Court and the Sixth Circuit have frustrated that intent by insisting on existing sales of the product being developed. This criterion was articulated in the context of a different Code section and has no proper application to Section 174.

ARGUMENT

I

THE LEGISLATIVE HISTORY OF SECTION 174 CLEARLY DEMONSTRATES THAT BURNS INVESTMENT COMPANY IS ENTITLED TO CLAIM THE DEDUCTIONS FOR RESEARCH AND DEVELOPMENT WHICH ARE AT ISSUE IN THIS CASE.

The Sixth Circuit, in its opinion below (Cert. App. 35-44), denied Burns Investment Company the deductions which it had claimed under Section 174. That section allows a taxpayer to deduct research or experimental expenditures "which are paid or incurred by him during the taxable year in connection with his trade or business." The Court held that Burns had not yet become an established trade or business because "as of 1966 it (Burns) had no product to offer." (Cert. App. 38).

Petitioner Snow strongly contends that this interpretation of Section 174 stands in direct opposition to the purposes behind that section's original enactment.

Section 174 was intended to be a liberalizing provision to allow expenditures which otherwise would have to be capitalized to be deductible in the year incurred. The legislative history of Section 174 indicates a broad purpose to provide an economic incentive, especially for small and growing businesses, to engage in the search for new products and new inventions. The measure was initially introduced in Congress in 1951 "to clarify the existing confusion in respect of tax treatment of such expenditures, and to prevent tax discrimination between large businesses having continuous programs of research and *small or beginning enterprises*." 97 Cong. Rec. 4326 A (1951) (Extension of Remarks of Rep. Camp.) (Emphasis supplied).

The remarks of Mr. Reid of New York, Chairman of the House Committee on Ways and Means addressed to the House during consideration of the H. R. 8300, the Bill embodying the Internal Revenue Code of 1954, give further indication of the purpose of Section 174 as finally enacted:

"Research and Development Expenditures: Present law contains no statutory provisions dealing with the deduction of these expenses. The result has been confusion and uncertainty. Very often, under present law, small businesses which are developing new products and do not have established research departments are not allowed to deduct their expenses despite the fact that their large and well-established competitors can obtain the deduction. . . . This provision will greatly stimulate the search for new products and the new inventions upon which the future economic and military strength of a Nation depends. *It will be particularly valuable to small and growing businesses.*" 100 Cong. Rec. 3425 (1954) (Emphasis supplied).

Remarks by a spokesman for the United States Treasury clearly indicate that the Treasury Department's understanding of the intent of the proposed Section 174 was in complete harmony with the congressional concern shown above. During the course of the enactment of the 1954 Code, Under Secretary Marian B. Folsom made the following presentation to the Senate Finance Committee:

"SUMMARY OF 27 OF THE
PRINCIPAL PROVISIONS OF H.R. 8300

19. RESEARCH AND DEVELOPMENT EXPENSE

Present

No specific statutory treatment. Uncertainty whether particular expenditure is deductible or must be capitalized, particularly where there is no regular research budget. Unusual research expenses must be capitalized and written off in later years. Discourages research. Especially restrictive for small businesses.

Proposed

Provide definite rules, giving option to taxpayers to capitalize or write off research and experimental activity. *Help small, pioneering businesses."*

Senate Finance Committee Hearing on H. R. 8300, 83rd Cong., 2nd Sess., p. 105, April 7, 1954. (Emphasis Supplied.)

Snow points out that the one common factor which stands out in all of the above remarks is the concern for businesses which were *not* well established. Section 174 was manifestly intended to help enterprises which were "small and pioneering," "small and growing," "small or beginning."

Given this background, a small, beginning business like Burns whose entire energies are devoted to a product development effort would therefore seem to be precisely the kind of company Congress sought to bring within the reach of Section 174. The decision by the Sixth Circuit in *Snow*, however, makes that section unavailable to this type of business, while preserving its availability to "large and well-established competitors."

The practical results of the Sixth Circuit's interpretation of Section 174 can be easily seen. An established

company with existing sales of a given product may refine and improve that product through research and experimentation and be permitted to deduct the costs of such research. An established company with existing sales of any given product may attempt to develop a completely new produce and will also be permitted to deduct the costs of such development, even though this new product is wholly unrelated to its current line of business. (*Best Universal Lock Co.*, 45 T.C. 1 (1965), Acq. 1966-2 C.B. 4). A new company with a new idea such as Burns, however, is unable to deduct these expenses. The Sixth Circuit's construction of Section 174 therefore obviously discriminates against new enterprises in favor of established companies. This result, inequitable on its face, appears wholly unjustified when one remembers that the section was originally introduced in order to *prevent* tax discrimination. (Remarks of Rep. Camp., *supra*).

Allowing this discrimination to continue would tend to foster and perpetuate monopoly by frustrating the development of inventions or improvements by newly organized competitors of established business. American economic history gives ample testimony of the importance of a business which begins with only a new and ingenious idea. Polaroid and Xerox are examples of enterprises organized to develop new ideas which were initially rejected by established companies.

Snow submits that in order to prevent discrimination and thereby fulfill the legislative intent of Section 174, a company such as Burns should be allowed to deduct the research and development expenses which it has incurred.

THE "HOLDING OUT" THEORY OF DEPUTY VS. DUPONT AND RICHMOND TELEVISION HAS NO LOGICAL RELATION TO SECTION 174. THUS THE EXTREMELY HEAVY EMPHASIS WHICH THE SIXTH CIRCUIT'S OPINION PLACED ON THIS THEORY WAS ENTIRELY MISPLACED.

The issue which this Court has agreed to decide is easily framed: Were these research and development expenditures paid or incurred by Burns Investment Company "in connection with its trade or business"? If so, they are deductible under Section 174. If not, they are not deductible under Section 174 or any other Code section.

The trade or business of Burns Investment Co. during the taxable year in issue was "the development of a special purpose incinerator for the consumer and industrial markets." (App. 81). That purpose was pursued by Burns on an extensive, varied, continuous, frequent and regular basis. (*Austin v. Comm.*, 298 F.2d 583 (2nd Cir., 1962); *Wright v. Comm.*, 274 F.2d 883 (6th Cir., 1960); *Miller v. Comm.*, 102 F.2d 476 (9th Cir., 1939); *Kazdin v. Comm.*, 28 T.C.M. 432 (1969).

From the inception of Burns, the incentive behind all of this activity was one of profit. Snow contributed capital and time to Burns because he believed the incinerator would be a profitable venture. (App. 19). Trott, the general partner, created three separate partnerships (Echo, Courier and Burns) in order to permit the various partners to participate only in the development of a product(s) which they felt would return a profit. The fact that Burns was not profitable during its first year, 1966, in no way

detracts from this profit motive. In a recent Tax Court case, the court noted that:

"... the lack of economic return to the petitioner does not alone rule out the intention and expectation of making a profit. Such experimental activity often shows little, if any, return during developmental stages. It was to encourage this kind of activity that Congress authorized the current deduction of research and experimental expenditures." *Eugene J. Magee v. Commissioner*, 32 T.C.M. 1973-271.

Despite this profit-oriented activity, the Sixth Circuit held that the expenditures were not made in connection with the trade or business of Burns. A thorough reading of the decision shows that the principal factor on which this conclusion was based was that "Burns Investment Company in 1966 was not holding itself out to others as being engaged in the selling of goods and services." (Cert. App. 38).

Snow readily concedes that Burns was indeed not "holding itself out" to others as being engaged in the selling of goods and services in 1966. Burns was, however, holding itself out as being engaged in the business of developing a special purpose incinerator for the industrial and consumer markets. The incinerator was simply not yet ready to be economically sold in 1966. Snow insists, however, that the "holding out" test as used by the Sixth Circuit has absolutely no relevance in a Section 174 case.

This test was first articulated by Justice Frankfurter concurring in the case of *Deputy v. Dupont*, 308 U.S. 488, 499 (1940). Snow points out that *Deputy v. Dupont* concerned the disallowance of "ordinary and necessary" business expenses which had been claimed under Section 23(a) of the Internal Revenue Code of 1928 (now Sec-

tion 162).³ In fact, the full text of Justice Frankfurter's statement, which was only partially quoted by the Sixth Circuit, is as follows:

"Carrying on any trade or business, *within the contemplation of* 23 (a), involves holding one's self out to others as engaged in the selling of goods or services." *Dupont* at 499. (Emphasis supplied.)

The *Snow* case concerns deductions claimed under Section 174, and yet the Sixth Circuit's decision rests almost exclusively on a test which was expressly limited to the context of a different Code section by that test's original proponent.

Presumably the Sixth Circuit felt itself justified in transplanting the "holding out" test from Section 162 onto Section 174 because the two provisions have in common the use of the phrase "trade or business". Variations of the term "trade or business", including "active conduct of a trade or business," are used in at least sixty different sections of the Internal Revenue Code of 1954.⁴ This no doubt explains why a satisfactory all-inclusive definition of that term has never been formulated.

"There is no ultimate definition because the deductibility is dependent upon the examination of all the facts and activities of the taxpayer in each case." *Mertens, Law of Federal Income Taxation*, Vol. 4A, Chap. 25, Page 33.

Whenever this Court has had the occasion to interpret the term "trade or business," that interpretation has been

³ Section 162 reads in pertinent part:

"(a) In General — there shall be allowed as a deduction all of the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business,"

⁴ *Saunders, Trade or Business, Its Meaning Under the Internal Revenue Code*, So. Cal. 12th Inst. on Fed. Tax. 693 (1960).

limited to the context of the particular section under which the case arose. *Deputy v. Dupont*, 308 U. S. 488, 499 (1940); *Higgins v. Commissioner*, 312 U. S. 212 (1941); *Whipple v. Commissioner*, 373 U. S. 193, 203 (1963).

It thus seems improbable that the phrase "trade or business" has the same meaning in all of these sixty-odd Code sections. Even if a uniform definition of this term were able to be formulated, however, the sections involved herein (162 and 174) are marked by basic differences in prefatory language and intent. These differences are far more crucial to a proper understanding of the sections than is their common use of the term "trade or business."

Section 162 allows deductions for "ordinary and necessary" expenses incurred "in carrying on" any trade or business. Section 174, on the other hand, seeks to encourage experimentation by allowing deductions for "research and development" expenses incurred "in connection with" a trade or business.

The different language used in these two statutes argues strongly against transposing the "holding out" test from one to the other. "Holding one's self out" may well be a proper criterion to test whether or not a taxpayer is "carrying on" a business, since the phrase "carrying on" is normally addressed only to an activity which has already become well-established.⁵

Despite the fact that the phrase "carrying on a trade or business" had been in statutory existence since 1928, Congress chose to use another phrase — "in connection with a trade or business" — for purposes of Section 174. Snow believes this choice is solid evidence that the benefits of Section 174 were never intended to be limited to solidly

⁵ Webster's Third New International Dictionary (1967 Ed.) contains the following definition: "Carry on: . . . (2) to *continue* one's course or activity." (Emphasis supplied.)

established or "going" businesses. The omission of the phrase "carrying on" is therefore in complete accord with the avowed Congressional intent discussed earlier, *i.e.*, to encourage small enterprises which have not yet reached the well-established stage. In addition, it is certainly reasonable to assume that the statutory phrase "research and development" presupposes a product which is not yet in a marketable condition, yet the "holding out" or "going business" test demands existing sales of the product in order to qualify these deductions.

A further indication that the two sections are not to be construed as one is given by the fact that Section 174 itself contains absolutely no reference to Section 162. In contrast, there are other Code sections which do contain such a reference. See, for example, Section 1402(c) and Regulation 1.512(a) - 1(b).

Unlike the Sixth Circuit, the Fourth Circuit Court of Appeals has apparently grasped the fundamental differences between Section 162 and Section 174.

In the case of *Cleveland v. Commissioner*, 297 F.2d 169 (4th Cir., 1961), an attorney (Cleveland) who was interested in experiments conducted by one of his clients (Kerla), began to lend Kerla financial assistance. Kerla was involved in trying to develop a new kind of liquid binder. Shortly after the enactment of Section 174, a formal trust agreement was entered into whereby Cleveland purchased a participating one-half interest in the invention for the past loans. In 1955 and 1956, Cleveland claimed deductions under Section 174 for funds attributable to research and development which were advanced subsequent to the agreement. *Cleveland's* facts do not indicate that the binder was ever actually marketed or that any patent was ever applied for. The Commissioner

and the Tax Court held that these advances were not deductible. The Fourth Circuit reversed, holding:

"In this instance the decision of the parties to the agreement to define their relationship so as to take advantage of the benefits of the statute was in harmony with the purpose of the enactment to encourage expenditures for research and experimentation." *Cleveland* at 171.

Despite the great similarity in the facts of *Snow* and *Cleveland*, the Sixth Circuit chose not to follow *Cleveland*, stating that "we prefer the logic of the later Fourth Circuit holding in *Richmond Television Corporation v. United States*, 345 F.2d 901, (4th Cir., 1965) to the Fourth Circuit's earlier holding in *Cleveland*." (Cert. App. 40).

This statement would seem to imply that *Richmond* had qualified or overruled the *Cleveland* decision. A reading of *Richmond*, however, reveals that the case never so much as mentions *Cleveland*. This omission seems quite proper since the issue in *Richmond* was whether a television station's "start-up" or "preparatory" expenses were incurred in carrying on a trade or business and therefore deductible under Section 162. *Cleveland*, on the other hand, concerned the deductibility of research and experimental expense under Section 174.

Snow also concerns Section 174 and not Section 162. The characteristics which distinguish these two sections have been discussed above. The Sixth Circuit therefore erred in applying *Richmond* to *Snow*.

The Sixth Circuit's decision below rested almost exclusively upon the fact that Burns Investment Co. did not pass the "holding out" test during 1966. As discussed above, *Snow* believes that this test has no proper application to a Section 174 case. If *Snow* is correct in this belief, then Burns Investment Company did make these ex-

penditures "in connection with its trade or business" and is therefore entitled to deduct these expenses under the provisions of Section 174.

III

THE FACT THAT SNOW WAS A "HIGH BRACKET TAXPAYER" HAS ABSOLUTELY NO RELEVANCE TO THE ISSUE BEFORE THIS COURT.

In its opinion below, the Sixth Circuit made the following observation:

"One other fact should be added. Snow had an income in 1966 at his principal occupation as an Executive Vice President of Procter & Gamble in excess of \$200,000. As a consequence, if Section 174 applied, his investment in Burns was made as a high bracket taxpayer. Thus, as is so frequently true, two laudable public purposes are in direct conflict: (1) the Congressional purpose of stimulating research and development, including research and development on the part of inventors and small businessmen, and (2) the desirability of strict interpretation of tax laws, so as to prevent unintended tax shelters." (Cert. App. 37-8).

Snow wishes only to make two brief comments about the above remarks:

(1) Snow submits that the issue before this Court concerns the ability of a beginning business to claim deductions under Section 174. The amount of Snow's income from Procter and Gamble has absolutely no relation to whether Burns incurred these expenses "in connection with its trade or business."

(2) It is completely incorrect to refer to a Section 174 expenditure as an "unintended tax shelter." There is no sheltering of income involved here. If Burns fails to realize a profit, the partners in Burns sustain a genuine economic loss.

In contrast to an unintended tax shelter, in the instant case we are dealing with a tax *incentive*. "Tax incentives are provisions that are carefully considered and intentionally enacted into law by the Congress of the United States."⁶ This particular incentive was enacted in order to encourage research and development. Snow's reliance on Section 174 was therefore precisely the result which Congress intended.

The record clearly shows that Snow, who has already paid over \$80,000 in 1966 income taxes, became a partner in Burns not to "shelter" taxes but rather with the expectation of realizing a profit on which he would pay additional taxes.

IV

SNOW IS REQUIRED BY LAW TO DEDUCT HIS DISTRIBUTIVE SHARE OF ANY TAXABLE INCOME OR LOSS GENERATED BY BURNS.

In the foregoing argument (I-III), Snow has shown that the entity known as Burns Investment Company was entitled to deduct research and experimental expenses which were incurred in connection with its trade or business during the taxable year 1966. Burns made a proper election to claim these deductions in its partnership return (Form

⁶ Remarks by the Honorable Samuel R. Pierce, Jr., General Counsel, U. S. Treasury, Thirteenth Southwestern Ohio Tax Institute, December 1, 1972.

1065) for that year. (App. 125). Because of these expenses, Burns sustained a net operating loss of \$36,780.

Section 702 (a) (9) of the Internal Revenue Code of 1954⁷ requires that Snow, as a partner in Burns, take into his individual account his distributive share of the loss sustained by Burns. The fact that Snow was a limited partner in Burns does not alter the requirements of Section 702. "The Code and Regulations make no distinction here significant between ordinary and limited partnerships." *Butler v. Commissioner*, 36 T.C. 1097 (1961), Acq. 1962-1 C.B. 3; *Estate of Ellsasser v. Commissioner*, 61 T.C. No. 26 (1973).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the courts below should be reversed.

Respectfully submitted,

BURGESS L. DOAN
HAROLD W. WALKER
522 Dixie Terminal Building
Cincinnati, Ohio 45202
Counsel for Petitioners

February 21, 1974

⁷ Section 702 — Income and Credits of a Partner — (a) General Rule — In determining his income tax, each partner shall take into account separately his distributive share of the partnership's . . . (9) taxable income or loss, exclusive of items requiring separate computation under other paragraphs of this subsection.

